Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

Reply Comments of the
Public Service Commission of Wisconsin

The Public Service Commission of Wisconsin (Wisconsin Commission) respectfully files these comments in response to the Notice of Proposed Rulemaking (NPRM) released March 10, 2004, in the above-captioned proceeding. The NPRM seeks comment on a variety of issues related to services and applications using Internet Protocol (IP-enabled services).

The Wisconsin Commission agrees with the Federal Communications Commission's (FCC) starting point in the NPRM--that if IP-enabled services are to be regulated, such regulation should be minimal (NPRM, para. 5). As pointed out in comments filed by other state public utility commissions (PUCs), public interests underlying some existing regulations such as emergency 911 service, law enforcement access, consumer protection, and consumer privacy cannot not be ignored. To the extent that regulation of IP-enabled services is imposed, it should be used to address important public policy considerations.

Discussion

The potential for IP-enabled services, such as Voice over Internet Protocol (VOIP) offerings, is both extraordinary and exciting. These services have the potential to provide much more diverse choices in telecommunications because the Internet's open data architecture will allow end-users to directly control innovations and customizations of services.

IP-enabled services do not depend upon a new technology; its underlying technology has been used in the delivery of currently regulated voice services for many years. IP-based services have been the standard method of handling digitized voice traffic on trunks connecting end office switches. The questions being raised by this NPRM are a result of the expansion of the technology to deliver digitized voice to the edge of the network, that is, all the way to the end user. These comments focus on the issues raised by the unique set of circumstances presented by pushing this technology to the edge of the network and into the premises of residence and business customers.

In these comments, the Wisconsin Commission will address: (1) the categorization of IP-enabled offerings, (2) jurisdictional matters, and (3) appropriate legal and regulatory framework.

Categorizing IP-Enabled Services

The FCC has solicited comment "regarding how, if at all, we should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate." (NPRM, para. 35.) The Wisconsin Commission believes that it is appropriate for regulatory purposes to create categories of IP-enabled services that are based on an offering's advertised and actual

functionality. IP-enabled services that traverse the public switched telecommunications network (PSTN) and effectively mimic more traditional telecommunications service should be in one category, subject to minimal regulation, whereas those offerings that use a "private network" should be in another category, not subject to regulation. The distinction between the private and public networks may be determined by how the service presents itself to the user; i.e., can you reach anyone, or just those subscribing to the same service? The FCC has already recognized the significance of the "private" versus "public" network distinction in two recent decisions.[1] The distinction between "public" and "private" networks will provide an analytical method that is logical, transparent, and technologically neutral.

Jurisdictional Considerations

The FCC seeks comment on the jurisdictional nature of IP-enabled services (NPRM, para. 38). Some commenters assert that the FCC should have exclusive jurisdiction over all IP-enabled services.[2] To support this determination, these commenters assert that IP-enabled offerings are "information services" and not "telecommunications services" or are interstate in character. Some commenters base preemption of state authority on the "mixed use" doctrine (NPRM, para. 39). This doctrine supports pre-emption where intra and interstate service cannot be separated.

The Wisconsin Commission submits that it is premature to determine that all IP-enabled services should be subject to *exclusive* federal jurisdiction. As pointed out in

[1] In the Matter of Petition for Declaratory Ruling That AT&T's Phone-to-Phone Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, *Order*, (rel. April 21, 2004), and In the Matter of Petition for Declaratory Ruling that pulver.com 's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, WC Docket No. 03-45, *Memorandum Opinion and Order*, DA 03-439 (rel. February 19, 2004).

[2] For example, see Comments of Vonage Holding Corp., WC Docket No. 04-36, p.14.

comments submitted by other state commissions, the legal basis for pre-emption of state authority is not clear.[3] This is particularly the case with IP-enabled services that use the North American Numbering Plan and the PSTN and are promoted as replacement for traditional wireline telephone service.

The Wisconsin Commission submits that public policy considerations do not support exclusive federal jurisdiction. It is both unnecessary and potentially harmful to pre-empt state oversight of services that hold themselves out as a substitute for traditional telecommunications services simply because they make use of a different technology. It is unnecessary because minimal state oversight will not hinder or limit technological innovation or diversification. It is potentially harmful because consumers will not be able to depend upon state public utility commissions for assurance of legitimacy, reliability, and accountability. For a decade or more, most state PUCs have been in the business of carefully reviewing of the areas where market forces are and are not sufficient to assure minimum service availability, quality and standards or to protect public policy and consumer interests. PUCs have addressed these issues from local, statewide, and regional perspectives and have shown both the ability and sensitivity to balance reliance on competition with necessary oversight. PUCs have also been the initial authority for interconnection and contract issues for opening local service markets to competition and the authority consumers turn to for service complaints.

The result of pre-emption in the area of telecommunications would deprive states of the ability to foster economic development within each state. How can the Wisconsin Commission assure that service providers (broadband and VOIP providers alike) will provide these services to all Wisconsin consumers interested in obtaining them if state

[3] For example, see Comments of Minnesota Public Utility Commission, WC Docket No. 04-36, p. 6-7, 9.

authority is pre-empted? Further, pre-emption of state authority will create an unbalanced competitive playing field wherein traditional service providers will bear the burdens of serving less-profitable locations and customers at higher and higher costs.

The Wisconsin Commission is also concerned that federal preemption not impair the ability of PUCs to ensure the timely availability of the broadband connections on which VOIP services depend. The competitive market may provide such service to all areas of the country--but the market may not provide such service to high-cost, low-density areas in a timely manner. Where required, PUCs may need to use the Universal Service Fund (USF) funds or other incentives to ensure delivery of the broadband services required for VOIP, or other such service, more rapidly than might be accomplished by the market alone. The Wisconsin Commission is concerned that FCC pre-emption of state authority over VOIP services might create legal constraints on PUC ability to advance universal service in this manner.

The expansion of IP technology to the retail sector of the publicly accessible communications networks challenges the long-standing cooperative system of federal and state authority over the country's system of communications.[4] The FCC should take this opportunity to reinforce the successful and mutually beneficial relationship between the federal government and the states. This relationship has produced beneficial results for

[4]The basis for continuing to apply the traditional federal-state cooperative jurisdictional system to IP-enabled services is also found in at least one other prior FCC order, the order relating to IP-technology as applied to the telecommunications relay services (TRS). DA 03-2111: In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for individuals with Hearing and Speech Disabilities. Released June 30, 2003. (TRS Order.) The order contemplates an intrastate and interstate compensation scheme that presumes traffic can be identified as intrastate versus interstate.

the industry and consumers. The FCC should resist asserting complete jurisdiction over all IP-enabled services.[5]

Appropriate Legal and Regulatory Framework

The NPRM invites comments regarding the "proper legal classification and appropriate regulatory treatment of each specific class of IP-enabled services" (NPRM, para. 42). Wisconsin Commission is not proposing to regulate the Internet or to impose traditional economic regulation over any category of IP-enabled offerings. State regulation of retail rates of IP-enabled services is neither necessary nor consistent with the competitive approach for other telecommunications service providers that do not have market dominance.

As noted in comments filed by other state PUCs, the Wisconsin Commission believes that certain public policy considerations must be addressed for IP-enabled services that purport to substitute for traditional telecommunications service and use the PSTN.[6] State oversight for these IP-enabled services remains appropriate with respect to public health and safety concerns (911, 711 and 211 access), consumer protection issues, intercarrier compensation, numbering and, maintenance of the legacy telecommunications network.

Some commentators suggest that even minimal regulation will chill innovation and development of IP-Enabled services.[7] Many innovative businesses and services, however, have been assisted to market by government assurance that minimum consumer

[5] It is noteworthy that state PUCs uniformly support continued state federal jurisdiction of IP-enabled services particularly as it relates to public health and safety issues. For example, see Comments of Maine Pubic Utility Commissioners, p. 4; Iowa Utility Board, p. 3.
[6] For example, see Comments of Arizona Corporation Commission, WC Docket No. 04-32, p. 13-18..
[7] For example, see Comment of Net2Phone, WC Docket No. 04-32, p. 21-22.

expectations will be met. This assurance in the form of regulatory compliance can and often does have a stabilizing effect on new market goods and services.[8] The Wisconsin Commission submits that regulation of IP-enabled services with respect to public health and safety, consumer protection, intercarrier compensation, numbering and, maintenance of the legacy telecommunications network will encourage the acceptance and proliferation of these services in the retail market.

The Wisconsin Commission agrees that all of the elements of legacy state and federal regulation may not be appropriate for IP-enabled services, but continued commitment to the underlying policy issues should guide both state and federal regulators in the development and application of an appropriate regulatory framework. Preference for reliance on "market forces" is laudable, but market forces cannot possibly be expected to address all of the real and potential issues that exist today and in the future as they relate to providing telecommunications services to everyone. In Wisconsin, almost every IP-enabled voice service falls within the definition of "telecommunications service" as set forth in Wisconsin statutes.[9] However, the level of regulation of any provider of these services would be set by the terms of the certification granted. Certification conditions are generally based on, and vary among, the types of providers.

The FCC should reflect upon prior examples of new service offerings and regulatory frame work in place when those services emerged. For example, the deregulation of long distance service in the 1980s lead to increased choices for

[8] FDA approval is an example in the food and drug industry.

[9] Wis. Stat. § 196.01(9m). "Telecommunications service" means the offering for sale of the conveyance of voice, data or other information at any frequency over any part of the electromagnetic spectrum, including the sale of service for collection, storage, forwarding, switching, and delivery incidental to such communication and including the regulated sale of customer premises equipment. "Telecommunications service" does not include cable television service or broadcast service.

consumers but also brought "slamming" and other abusive practices. While state PUCs did not retain extensive regulatory authority over long distance companies, state certification requirements provided a basis to ensure minimal consumer protection standards were in place.

As stated above, commitment to the underlying policy issues should guide both state and federal regulators in the development and application of an appropriate regulatory framework. The public would be adversely affected if IP-enabled services that access the PSTN are exempted from obligations customarily associated with telecommunications services including the following:

- The Communications Assistance for Law Enforcement Act (CALEA);
- Disability access requirements;
- Compliance with 911, E911, 711 and 211 service requirements;
- Appropriate compensation for use of the PSTN as well as support for universal service and competitive considerations such as number portability;
- Compliance with consumer protection and consumer privacy requirements.

The migration to IP-enabled services may undermine standard support mechanisms for universal service due to dwindling revenues and subscribership for plain old telephone service (POTS). Yet, maintaining legacy networks and low-income customer subscription levels will require state and federal involvement and an ability to collect for and distribute from the USF. Ultimately, the cost of POTS, related equipment, and dial-up service or broadband connections may diminish future telecommunications

service subscription levels. States may need authority to try innovative approaches to maintain universal service and to increase subscription to advanced services among various populations. The assurance that rural and low-income customers will have access not only to basic services but other enhanced networks, which IP-enabled services may foster, will ultimately become the focus of the USF. The funds necessary to assure access to enhanced services will likely be more than the funds necessary to assure access to basic service. The question then becomes, what services will contribute to the necessary funds if not the IP-enabled services?

Conclusion

There is no debate that IP-enabled services are a key part of the future for communications. IP-enabled services began at the center of the network, and have moved closer and closer to the customer premises–and will eventually come to characterize all telecommunications. Providers are developing new offerings using the technology and customers are seeking the price and service related advantages that these offerings can provide. Government oversight of these new offerings should not, and need not, interfere with future growth. Setting the appropriate level of regulation and state involvement can, in fact, promote the growth of IP-enabled services. States should, and must, proceed according to the powers vested in them by the federal government, state law, and state residents to responsibly assure that telecommunications services are

available to state consumers and that those services foster public safety, economic development, and adhere to appropriate consumer protection standards.

Dated at Madison, Wisconsin, _____July 8, 2004_____

By the Commission:

____/s/ Lynda L. Dorr/djg____
Lynda L. Dorr
Secretary to the Commission

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